THE HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE WASHINGTON MUTUAL, INC. SECURITIES, DERIVATIVE & ERISA LITIGATION IN RE WASHINGTON MUTUAL, INC. SECURITIES LITIGATION This document relates to: ALL ACTIONS	No. 2:08-md-1919 MJP **UNDERWRITER DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED CONSOLIDATED CLASS ACTION COMPLAINT** [UW-3] Lead Case No. C08-387 MJP NOTE ON MOTION CALENDAR: October 9, 2009 **ORAL ARGUMENT REQUESTED**

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I. INTRODUCTION

Having been given the opportunity to amend their complaint to cure their standing defects, but having failed to do so, Plaintiffs' Opposition now admits almost all the key facts, but urges the Court to defer its ruling on these threshold issues until the class certification stage. This Court, however, has already rejected Plaintiffs' argument that standing is a class certification issue, and previously dismissed all claims relating to the August 2006, September 2006, and December 2007 Offerings precisely on standing grounds in its Order on Defendants' Motions to Dismiss dated May 15, 2009 (the "Dismissal Order"). *In re Washington Mutual, Inc. Sec., Deriv. & ERISA Litig.*, 2009 WL 1393679, at *14 (W.D. Wash. May 15, 2009). Plaintiffs' discussion of these issues—relegated to the back of their Opposition—presents no justification for deferring the inevitable.

First, the Opposition does not dispute that Named Plaintiff Pompano Beach Police & Firefighters' Retirement System ("Pompano Beach") did not purchase securities "in" the August 2006 Offerings. The Underwriter Defendants showed in the Opening Brief that under the Supreme Court decision in *Gustafson v. Alloyd*, secondary market purchasers simply do not have standing to sue under Section 12(a)(2)—yet the Opposition *does not even mention this controlling case.*

Second, and for the same reason, the Opposition concedes that Named Plaintiff Harlan Seymour ("Seymour") has no Section 12(a)(2) standing in connection with his purchase of Series K securities issued in the September 2006 Offering, since he, too, was a secondary-market purchaser.

Third, Plaintiffs' Opposition does not dispute the Underwriter Defendants' showing that Pompano Beach suffered no actual injury in connection with the August 2006 Offering of 5.50% Notes, as required for both Section 11 and Section 12(a)(2) standing.

Fourth, the Opposition concedes that Seymour must plead "actual reliance" in connection with his Section 11 claim, because his purchase came over one year after the offering and after the issuance of at least twelve months of earnings by WaMu. But the Opposition points to no *facts* that satisfy the actual reliance element of his cause of action, other than a conclusory allegation of "reliance" that is insufficient as a matter of law under the recent Supreme Court decisions in

Twombly and *Iqbal*.

Finally, Plaintiffs fail to overcome the argument that Named Plaintiff The Police & Fire Retirement System of the City of Detroit ("Detroit P&F") lacks Section 11 standing because it was an "in and out" purchaser of Series R securities, and lacks standing because it suffered no damage. While Plaintiffs rely on a Wall Street Journal article to support its contention that Detroit P&F sold its Series R stock after a "corrective disclosure," that argument is based on an allegation that is not within the 1933 Act claim as pled, and in all events is simply meritless.

Beyond these standing deficiencies, the Amended Complaint also founders on negative causation grounds. In attempting to defeat the negative causation defense, Plaintiffs mischaracterize this Court's prior Dismissal Order, take liberties with the allegations in their own Amended Complaint, and fundamentally misread or ignore the loss causation case law applicable to their claims, including the controlling Ninth Circuit decision in *Metzler v Corinthian Colleges*, discussed below. Plaintiffs' central contention that this Court already has decided these negative causation arguments as a pleading matter is incorrect. Indeed, negative causation is powerfully made out on the face of the Amended Complaint as to the December 2007 Offering—an issue that this Court never reached in its prior Dismissal Order, which it expressly limited to the October 2007 Offering given the absence of standing with respect to all of the other Offerings. And, even with respect to the October 2007 Offering, the Court did not address the arguments advanced by the Underwriter Defendants in the prior motion, which are ripe for resolution now.

II. THE OPPOSITION FAILS TO DEMONSTRATE THAT THE NEWLY-ADDED PLAINTIFFS HAVE STANDING TO SUE ON THE AUGUST 2006, SEPTEMBER 2006, AND DECEMBER 2007 OFFERINGS

A. The Opposition Concedes That No Named Plaintiff Purchased Any Securities "In" the August 2006 Offering, and That No Named Plaintiff Suffered Actual Injury In Connection with the Purchase of The 5.50% Notes

Plaintiffs' Opposition effectively concedes that there is no Section 12(a)(2) standing on their claims related to the August 2006 Offerings. The undisputed fact that Pompano Beach

purchased Floating Rate Notes in a *secondary market transaction* is fatal to its Section 12(a)(2) standing under *Gustafson v. Alloyd, Inc.*, 512 U.S. 561 (1995)—a case not even mentioned in the Opposition—and the other cases cited in the Underwriter Defendants' Opening Brief.[1]

Plaintiffs' Opposition suggests that the Court's prior Dismissal Order somehow establishes Pompano Beach's standing to sue. But the Dismissal Order is unhelpful to Plaintiffs for two reasons. First, the Underwriter Defendants' prior motion to dismiss raised an entirely different Section 12(a)(2) standing issue—the "purchaser-seller" rule under *Pinter v. Dahl—not* the "public offering" limitation for standing under *Gustafson.* Second, unlike the new Named Plaintiffs, the different Named Plaintiff at issue in the Court's prior ruling, Brockton, clearly purchased "in" the October 2007 Offering—literally on the day of that Offering, at the Offering price—and therefore Brockton's example only underscores why Pompano Beach lacks standing to sue. Further, the Dismissal Order cited *In re DDi Corp. Sec. Litig.*, 2005 WL 3090882 (C.D. Cal. July 21, 2005), a case that *dismissed* a Section 12(a)(2) claim "insofar as it is asserted on behalf of those who purchased DDi common stock 'traceable to,'" rather than "pursuant to," the Prospectus. *Id.* at *17. Like the plaintiff in *DDi,* Pompano Beach only alleges that it purchased securities "traceable to" the September 2006 Offering.

With respect to Section 11 standing to sue on the August 2006 Offerings, the Opposition argues that because Pompano Beach purchased securities traceable to the same Registration Statement as the 5.50% Notes, it therefore has standing to represent a class of purchasers of the 5.50% Notes. However, Plaintiffs do not allege that Pompano Beach suffered any actual *injury* relating to the 5.50% Notes, as required by the Ninth Circuit. *See Casey v. Lewis*, 4 F.3d 1516, 1519 (9th Cir. 1993) ("At least one named plaintiff must satisfy the *actual injury* component of standing in order to seek relief on behalf of himself or the class. The inquiry is whether any named

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[1] *See Caiafa v. Sea Containers Ltd.*, 2009 WL 1383457, at *2 (2d Cir. May 19, 2009); *In re Levi Strauss & Co. Sec. Litig.*, 527 F. Supp. 2d 965, 983 (N.D. Cal. 2007); *In re Valence Tech. Sec. Litig.*, 1996 WL 37788, at *4 (N.D. Cal. Jan. 23, 1996); and other cases cited at pp. 7-8 of the Underwriter Defendants' Opening Brief.

plaintiff has demonstrated that he has sustained or is imminently in danger of sustaining a direct injury as the result of the challenged conduct.") (emphasis added); *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 892-93 (9th Cir. 2007).[2] Plaintiffs' Section 11 claims relating to the 5.50% Notes issued in the August 2006 Offering therefore must be dismissed.[3]

B. The Opposition Concedes That Named Plaintiff Seymour Lacks Section 12(a)(2) Standing to Sue On The September 2006 Offering, And Fails To Allege Actual Reliance As Required By Section 11

For the same reasons discussed in Section II(A) *supra*, the Opposition offers no credible rebuttal to the argument that Seymour lacks Section 12(a)(2) standing to sue on the September 2006 Offering. Indeed, Seymour's standing problems are glaring—he not only did not purchase "in" the September 2006 Offering, he did not even come close—he admittedly did not purchase any Series K securities until almost *two years* after those securities were offered to the public. As in the case of Pompano Beach, Seymour is alleged to have purchased Series K securities not in the Offering itself, but merely "traceable to the Offering," (¶ 12). Seymour's certification further admits that he did not purchase Series K securities until July 15, 2008. Clearly, Seymour did not purchase "in" the September 2006 Offering.

With regard to Seymour's standing under Section 11, the Opposition concedes the central legal issue that Seymour must plead actual reliance because he purchased Series K securities long after WaMu had made available an earnings statement covering a twelve-month period following

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[2] *In re MobileMedia Sec. Litig.*, 28 F. Supp. 2d 901 (D.N.J. 1998), upon which Plaintiffs rely (Opp. at 13), actually supports defendants: there, the court held that plaintiffs had established standing because they "sufficiently alleged individual cognizable injuries" in connection with the purchase of securities. *Id.* at 911 n.7. Plaintiffs have failed in this case to allege *any* "individual cognizable injuries" in connection with the 5.50% Notes.

[3] Plaintiffs argue that *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 625 (1997) (requiring separate class representatives to represent different forms of injured class members), "emphasizes the appropriateness of waiting until class certification to address" Plaintiffs' standing to sue on the 5.50% Notes (Opp. at 14). However, *Amchem* was decided before *Twombly* and *Iqbal*, which require that standing be plead with more than "mere conclusory statements" to survive dismissal. 129 S. Ct. at 1949; 550 U.S. at 570.

the effective date of the Registration Statement, and thus he must plead actual reliance.[4] The Opposition then pays lip service, however, to this pleading requirement, relying exclusively on the boilerplate allegation of "reliance" in ¶841. ("Plaintiffs acquired these securities relying upon the statements in the Registration Statement (as updated by the Offering Documents) shown above to be untrue and/or relying upon Registration Statements (as updated by the Offering Documents) and not knowing the omitted material facts set forth above.").[5] Plaintiffs offer no authority that such a bald "say so" suffices, and the Underwriter Defendants made clear in their Opening Brief, the pleading of a *legal conclusion* is not enough under the Supreme Court decisions in *Twombly* and *Iqbal.* 129 S. Ct. at 1949 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

C. The Opposition Fails To Rebut The Underwriter Defendants' Showing That Detroit P&F Was An "In And Out" Trader Without Standing To Sue On The December 2007 Offering

The Opposition argues that the issue of whether Detroit P&F has standing to sue under the 1933 Act should be deferred until class certification, but fails to refute the case law holding that "in and out traders" lack standing to sue. The Opposition merely seeks to delay the inevitable.[6]

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4 15 U.S.C. § 77k(a). *See generally In re Surebeam Corp. Sec. Litig.*, 2005 WL 5036360, at *15 (S.D. Cal. Jan. 3, 2005).

5 The cases cited in Plaintiffs' Opposition are inapposite. In *Sterling Fed. Bank* (Opp. at 16), the complaint alleged reliance in connection with a specific security, which Plaintiffs have failed to do here. 2008 WL 4924926, at *5 (reliance sufficiently pled where "multiple instances within the Second Amended Complaint in which Plaintiff states that it 'reasonably and justifiably relied on misrepresentations made by [the Defendants]'"). In *First Bank Richmond* (Opp. at 16), the court merely held that the failure to allege that plaintiff "actually read and reviewed the Prospectus and Prospectus Supplement" was not dispositive. 2008 WL 4410367, at *6. *In re AEP ERISA Litig.* (Opp. at 15) is distinguishable because it is an ERISA case that does not address pleading of reliance under Section 11, and in any event was decided before the pleading standard under Rule 8 was heightened by *Twombly* and *Iqbal.* 327 F. Supp. 2d at 833. *Moss* (Opp. at 15), merely restates the pleading standard under *Iqbal* and in fact grants the defendants' motion to dismiss. 2009 WL 2052985, at *8.

6 *See, e.g.*, *In re Impax Labs., Inc. Sec. Litig.*, 2008 WL 1766943, at *7 (N.D. Cal. Apr. 17, 2008) (granting motion to dismiss because named plaintiff sold all of its shares prior to the corrective disclosure); *see also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 2009 WL 2169197, at *10 (2d Cir. July 22, 2009) (barring in-and-out trader from serving as class representative); *In re Compuware Sec. Litig.*, 386 F. Supp. 2d 913, 920 (E.D. Mich. 2005) (case dismissed because plaintiff "traded out of Defendant's stock long before the alleged inflated

[Footnote continued on next page]

Plaintiffs also attempt to inject a "fact issue" into whether Detroit P&F was an "in-and-out" trader by trying to import into their 1933 Act claims allegations that are conspicuously *not pled* in those Counts—suggesting that the allegation in ¶ 586 of the Amended Complaint identifying a December 21, 2007 Wall Street Journal article about an SEC inquiry into WaMu appraisal practices was a "corrective" disclosure. (¶ 586). While Plaintiffs admit that this allegation is *not pled* in their 1933 Act claims (Opp. at 17 n.5), they argue that they should be given leave to rely on allegations from the rest of their 1934 Act claims in order to cure the pleading defects in their 1933 Act claims. The Court should reject this transparent effort to re-write the Amended Complaint.

In all events, the Wall Street Journal article, entitled "*SEC Probes WaMu on Appraisals,*" does *not* indicate that the SEC had launched an inquiry that was broader than WaMu's loan appraisal practices. WaMu appraisal issues were already well known to the market by virtue of the very public lawsuit filed by the New York Attorney General in November 2007.[7] The Court also can take judicial notice of the fact that the disclosure in the Wall Street Journal article *caused no loss to Detroit P&F,* because the prices of Series R securities—the only securities that Detroit P&F purchased—did not decline after the Wall Street Journal article was published, they *went up.*[8]

Finally, and most important, the alleged "fact dispute" over the Wall Street Journal article assumes that the announcement of a regulatory investigation is sufficient under *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342-43 (2005), to establish loss causation. But that is contrary to the

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[Footnote continued from previous page]
price began to leak out of Defendant's stock price"). Plaintiffs cannot properly rely on *Makkor Issues & Rights, Ltd. v. Tellabs, Inc.*, 256 F.R.D. 586, 596-97 (N.D. Ill. 2009), which merely held that "in-and-out" traders "who suffered damage as a result of their purchase of Tellabs stock during the Class Period" had standing.

7 *See* Supplemental Declaration of Paul J. Lawrence, dated August 25, 2009 ("Supp. Lawrence Decl."), Ex. A. This Court may take judicial notice of this article, which is expressly referred to in the Amended Complaint.

8 *See* Supp. Lawrence Decl., Ex. B. This Court may take judicial notice of the public trading prices of the Series R securities, particularly since the Amended Complaint elsewhere makes reference to the trading prices of Series R securities. (¶¶ 622, 623). The very slight drop in the price of Series R securities in subsequent days also makes this case analogous to *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049 (9th Cir. 2008), in which the Ninth Circuit found a lack of loss causation where there was a "modest 10% drop" following the announcement of a regulatory investigation. *Id.* at 1064.

Ninth Circuit's decision in *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1064 (9th Cir. 2008) (announcement of investigation held insufficient to establish loss causation).

III. THE OPPOSITION FAILS TO REBUT THE UNDERWRITER DEFENDANTS' NEGATIVE CAUSATION ARGUMENTS

A. The Current Motion Is *Not* a "Motion for Reconsideration"

The Opposition seeks to deflect the substance of the Underwriter Defendants' negative causation argument by contending that this issue already was decided in the Court's prior Dismissal Order. The Opposition studiously avoids citation to that part of the Dismissal Order that stated that "[a]t present, the Court is limited to a review on the merits of the only offering for which Plaintiffs have standing, the October 2007 Offering." 2009 WL 1393679, at *14. The Dismissal Order explicitly did *not* rule on negative causation on the September 2006 or December 2007 Offerings.

Similarly, although the Opposition pejoratively describes the Underwriter Defendants' arguments as to the October 2007 Offering as a "motion for reconsideration," the Opening Brief made clear why the Court's prior ruling does not appear to have addressed the arguments that were actually advanced by the Underwriter Defendants. As we pointed out, in the prior motion the Underwriter Defendants did *not* "argue that loss causation does not exist because the recent downturn in the housing market, *not any disclosure regarding WaMu's financial health*, caused WaMu's stock price to plummet." 2009 WL 1393679, at *18 (emphasis added). The Underwriter Defendants argued precisely the *opposite*—namely, that *specific disclosures regarding WaMu's financial health*—under Plaintiffs' theory of the case—*did* cause loss, and that those disclosures occurred *before* the October and December 2007 Offerings. As Underwriter Defendants showed in the Opening Brief, the case law makes clear that if, as Plaintiffs contend, there were *material concealed risks* due to WaMu's alleged improper appraisal practices and deviation from underwriting standards, *those risks had materialized by the time of the October and December 2007 Offerings*—and most certainly by the time of the December 2007 Offering.

Finally, the negative causation issue relating to the September 2006 Offering is a new issue

created by the addition of Plaintiff Seymour for the first time in the Amended Complaint. Seymour purports to assert claims long after all the "corrective" disclosures had been made. Far from a "motion for reconsideration," the negative causation issues on this motion are newly-created by the addition of a seriously flawed named plaintiff. We address that issue first.

B. Negative Causation Is Shown On The Face Of The Amended Complaint As To The September 2006 Offering

The Opposition does not dispute that Seymour purchased his Series K Preferred Stock on July 15, 2008, after a long series of adverse disclosures by WaMu, and a significant plunge in the prices of Series K securities (¶¶ 622, 623). The Opposition utterly fails to show that Seymour lost any money as a result of alleged misrepresentations and omissions in the Series K Offering Documents that were still "alive" at the time of his purchase.[9] Plaintiffs must plead "that the practices that the plaintiff contends are fraudulent were revealed to the market and caused the resulting losses." *Metzler*, 540 F.3d at 1063. But the Opposition fails to point to any revelations of fraud subsequent to Seymour's July 15, 2008, purchase.[10] The disclosure that ends the class period a few days later revealed nothing "corrective" about alleged misstatements in the September 2006 Registration Statement. Under *Metzler*, Plaintiffs must show more than an announcement of negative news—the announcement must reveal the existence of a material misstatement in the Offering Documents, which the end-of-class-period disclosures failed to do.

In tacit acknowledgement of the weaknesses of their position, Plaintiffs argue that negative causation cannot be determined based on an individual plaintiff's purchases. Opp. at 11. But that assertion flies in the face of a number of recent decisions rejecting plaintiffs who,

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[9] Plaintiffs admit that the price of the Series K stock *rose* after Plaintiff's purchase (¶ 623) (noting that the Series K securities price was "$7.53 per share on July 23, 2008").

[10] Plaintiffs inexplicably point to the fact that the stock dropped several months later, upon the September 26, 2008 receivership—an event that has nothing to do with this case and is well outside the class period. At the oral argument on the prior motions to dismiss, Plaintiffs' counsel submitted to the Court a "Loss Causation Timeline" that nowhere even mentioned this post-class period event.

like Seymour, cannot establish loss causation. *See, e.g.*, *In re Shoretel Inc. Sec. Litig.*, 2009 WL 248326, at *5-6 (N.D. Cal. Feb. 2, 2009) (granting motion to dismiss where negative causation evident from named plaintiff's allegations); *Impax Labs*, 2008 WL 1766943, at *7 (granting motion to dismiss on loss causation grounds based on named plaintiff's trading history).

Finally, Plaintiffs resort to the argument that the Underwriter Defendants' negative causation defense should simply be deferred until class certification, when courts "routinely deny such challenges." Opp. at 12. But the Opening Brief cited decisions dismissing claims *at the pleading stage* when it was shown that a purchaser's losses cannot have been caused by statements in the offering documents. *See, e.g.*, *In re Alamosa Holdings, Inc. Sec. Litig.*, 382 F. Supp. 2d 832, 865-66 (N.D. Tex. 2005). Plaintiffs do not dispute this line of cases. Opp. at 4.[11]

In short, because there is no facially plausible relationship between the misstatements alleged in the September 2006 Offering Documents and Seymour's alleged losses several years later, his claims relating to the September 2006 Offering must be dismissed.

C. Negative Causation Is Shown On the Face Of The Amended Complaint As To The December 2007 Offering

In attempting to refute the Underwriter Defendants' argument that negative causation is shown on the face of the Amended Complaint as to the December 2007 Offering, Plaintiffs cite no cases, ignore the facts, and mischaracterize the Underwriter Defendants' arguments.[12]

Negative Causation as to the Entire Class. The Opposition clearly misstates the law when

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[11] Since the Opening Brief was filed, additional authority confirms this Court's power to decide this issue at the pleading stage, and to not await class certification. *See Rubin v. MF Global, Ltd.*, 2009 WL 2058590, at *8 (S.D.N.Y. July 16, 2009) (granting motion to dismiss where evident on face of complaint that losses were caused by disclosures unrelated to alleged misrepresentations).

[12] Courts routinely grant motions to dismiss where the affirmative defense of loss causation is apparent on the face of the complaint. In citing *Doe v. GTE* (Opp. at 5) for the proposition that "litigants need not try to plead around defenses," Plaintiffs misstate Ninth Circuit law. *See Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984) ("Ordinarily affirmative defenses may not be raised by motion to dismiss, but this is not true when, as here, the defense raises no disputed issues of fact.") (internal citation omitted); *see also McCalden v. California Library Ass'n*, 955 F.2d 1214, 1219 (9th Cir. 1990) ("For a complaint to be dismissed because the allegations give rise to an affirmative defense the defense clearly must appear on the face of the pleading.").

it contends that to establish the defense of negative causation, the prospectus supplement for the December 2007 Offering must have made a "complete admission of the as-yet-undisclosed facts that trickled out over the nine months following the December 2007 Offering." Opp. at 8. That contention is contrary to the cases holding that loss causation is established where, as here, the complaint demonstrates the *materialization of a concealed risk. See, e.g.*, *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 173 (2d Cir. 2005) (holding that to sufficiently plead loss causation, plaintiff must allege that the loss was "caused by the materialization of the concealed risk").

Second, Plaintiffs' own allegations concede that by the time of the December 2007 Offering, *the materialization of the risk of material credit losses and write-downs due to allegedly improper underwriting practices, had become public knowledge,* and that the entire point of the Offering was to try to stabilize a teetering company. (¶ 575-585) Indeed, the Amended Complaint specifically calls WaMu's disclosures on November 7, 2007, and the reactions of Wall Street analysts thereto, as *evidence of* "*the materialization of the Company's undisclosed and improper lending practices.*" (¶ 571). Among the disclosures the Opposition concedes occurred prior to the December 2007 Offering were the announcements in October and November 2007 of huge new losses and major increases to the company's loan loss reserves (Opp. at 7-8), the "bombshell" disclosure of the NYAG lawsuit in November 2007 (¶ 814), and the announcement of the total restructuring of WaMu's business to try to address its sudden liquidity crisis caused by these loan losses. Plaintiffs concede that WaMu's disclosures of these adverse facts in the December 2007 Prospectus Supplement were not "new"; rather, Plaintiffs admit that they were "echoes of disclosures already made" prior to the December 2007 Offering. Opp. at 8.

The market so plainly recognized that the allegedly concealed risks had materialized that *investors already had filed the first securities class action lawsuits by the time of the December 2007 Offering.* Plaintiffs attempt to trivialize these prior lawsuits by calling them a "distraction," and that those complaints have been "superseded." But it is a judicially noticeable *admission* that

by November 2007, when the first class suits were filed, investors had concluded that WaMu had engaged in securities fraud, dating back to at least March 2006, and that WaMu had concealed risks associated with its alleged acts of appraisal fraud, and that they therefore were suing to recover their losses. *See Anderson v. Clow*, 1994 WL 525256, at *11 n.16 (S.D. Cal. June 29, 2994) ("Plaintiffs' allegations in their prior pleading are admissible against them as admissions.").

Negative Causation as to Detroit P&F. Negative causation also is apparent on the face of the complaint as to Detroit P&F, an "in and out" trader that sold its entire position prior to the any alleged corrective disclosure. Courts have dismissed claims of "in and out" traders in similar circumstances. *Impax Labs.*, 2008 WL 1766943, at *7.[13] Despite these precedents, Plaintiffs argue that whether a disclosure is "corrective" is a matter for the fact-finder. Opp. at 10. But that is contrary to the law in this Circuit. See *Metzler*, 540 F.3d at 1064 (finding a that disclosure of regulatory investigation was not "corrective" as matter of law and granting motion to dismiss).[14]

D. Plaintiffs Fail to Demonstrate that Any Post-Offering WaMu Disclosures From December 15, 2007, through July 22, 2008, Were "Corrective"

The linchpin of the Opposition's argument that negative causation cannot be made out on the face of the complaint is the baseless assertion that "corrective" information continued to "leak" into the market throughout the rest of the class period. Without elaboration, the Opposition points to a "block" of allegations in the Amended Complaint as the supposed evidence of this, contending

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[13] As discussed in Section II(C) *supra*, in an effort to create a fact dispute over whether Detroit P&F was an "in and out trader," Plaintiffs purport to rely upon a December 21, 2007 Wall Street Journal article reporting that the SEC was investigating WaMu's appraisal practices. (¶ 586). But the article did not disclose anything "corrective." Moreover, the price of the Series R shares did not decline as a result of the article—the price went *up* the next day. *See* Supp. Lawrence Decl., Ex. B.

[14] Besides *Meltzer*, trial courts within the Ninth Circuit recently have found as a matter of law that disclosures of a regulatory inquiry are not corrective. *See, e.g.*, *In re Maxim Integrated Prods., Inc. Sec. Litig.*, 2009 WL 2136939, at *6 (N.D. Cal. July 16, 2009) ("[D]isclosures regarding compliance with an SEC investigation, . . . are not corrective disclosures for which Plaintiffs can plead loss causation."); *Teamsters Local 617 Pension & Welfare Funds v. Apollo Group, Inc.*, 2009 WL 890479, at *56 (D. Ariz. Mar. 31, 2009) ("the fact that a public company is subject to a 'regulatory investigation[,]' . . . does not amount to a corrective disclosure").

that "numerous additional corrective disclosures took place—through July 2008." Opp. at 8 (citing ¶¶ 557-627). However, this attempt to incorporate by reference literally scores of paragraphs of the Amended Complaint to establish loss causation must fail, for several reasons. First, *none of these allegations is included in the 1933 Act claims as pled.* Second, most of the alleged "corrective" disclosures are nothing of the kind—they are third party analyst and press reports, that do nothing more than report on the Company's new disclosures, or provide analyst opinions and forecasts, and themselves do not report anything "corrective." Third, the new disclosures made by WaMu that are included in this "block" of allegations are few in number, and short on anything "corrective." As a matter of law, the mere fact that WaMu reported *new* financial information, or news of executive departures or restructuring efforts, is not a "corrective" disclosure. *Metzler*, 540 F.3d at 1063. Plaintiffs' counsel conceded as much when it submitted its "Loss Causation Timeline" at oral argument before this Court in November 2008—and *did not include* most of the disclosures it now contends are "corrective." Plaintiffs' argument, if accepted by this Court, would lead to the absurd result that even after pervasive, adverse Company disclosures, loss causation is never fully established until the last cent of stock price has been wrung out of the Company by the marketplace. That is not the law, and in the absence of the pleading of *corrective* disclosure, the Ninth Circuit instructs that these claims must be dismissed. *Meltzer v Corinthian Colleges, supra.*[15]

IV. CONCLUSION

For all the reasons stated herein, the Underwriter Defendants respectfully request that the Court dismiss the Section 11 and 12(a)(2) claims in the Amended Complaint.

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[15] A summary of WaMu's alleged "corrective" disclosures made after the offerings, and why they must fail, is set forth in Appendix A to this Reply Brief.

DATED: August 25, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August 2009, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send notification of such filing to all counsel of record.

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APPENDIX A

SUMMARY OF POST-OFFERING ALLEGED "CURATIVE" DISCLOSURES

(AMENDED COMPLAINT, PARAGRAPHS 586-627)

AMENDED COMPLAINT CITE	DATE	DISCLOSURE TYPE	TOPIC	ON ORIGINAL "TIMELINE"?	REASONS NOT "CORRECTIVE"
¶ 586	12/21/07	Wall Street Journal press article, with quotes attributed to WaMu spokespersons	SEC inquiry into WaMu appraisal practices, in light of accusations in NY Attorney General lawsuit	yes	Substance of SEC inquiry into appraisal practices was not new—the New York Attorney General already had filed a well-publicized lawsuit challenging WaMu's appraisal practices—which the complaint described as a "bombshell" disclosure on November 1, 2007. The WaMu statements quoted in Press Release (Supp. Lawrence Decl., Ex. __) contain no corrective statements, and do not admit that any appraisals were false or fraudulent. No disclosure in the Wall Street Journal article shows that any statements in the Registration Statements were false. The article's speculation about possible accounting issues is not attributed to WaMu, the SEC, or any other identified source, and amounts to press speculation.
¶¶ 589-90	1/17/08	WaMu press release & conf. call	2007 year-end earnings	**no**	Announcement of fourth quarter and year-end results did not reveal any "corrective" facts. Press release repeated information already disclosed by WaMu re cut in dividend, and loan loss provision for the fourth quarter was within range of $1.5 to $1.6 million.
¶ 593	1/29/08	WaMu Form 10-K	2007 annual report	**no**	The annual report simply repeated financial information disclosed in January 17 earnings release—this allegation admits that the "2007 Form 10-K repeated the financial results set forth in the Company's January 17 press release."

AMENDED COMPLAINT CITE	DATE	DISCLOSURE TYPE	TOPIC	ON ORIGINAL "TIMELINE"?	REASONS NOT "CORRECTIVE"
¶ 603	4/08/08	WaMu press release	Q1 2008 earnings	yes	Earnings release announced first quarter financial results, but nothing that was "corrective" of prior statements. Announcement of new loan loss provision was not "corrective." Announcement that WaMu as closing offices and eliminating jobs was "new news," not corrective. Announcement of new direct sale of equity securities to TPG was not corrective. The alleged "massive dilution" caused by TPG deal in 2008 was not corrective of any misstatements in the Registration Statements in 2006 and 2007.
¶ 608	4/29/08	WaMu press release	Cathcart resignation	**no**	Disclosure that Cathcart had left the company was not corrective. No allegation that his departure was due to fraud or misconduct.
¶ 609	5/12/08	WaMu Form 10-Q	Q1 2008 earnings	**no**	Form 10-Q for first quarter of 2008 merely repeated financial information disclosed in Q1 2008 earnings release issued on April 8. No "corrective" disclosure was made in the Form 10-Q.
¶ 610	6/2/08	WaMu press release	Killinger steps down as Chairman of the Board, but continues as a director	**no**	Announcement of Killinger's replacement by Stephen Frank is not "corrective" disclosure. The Company made no statements indicating that Killinger engagement in any fraud or misconduct.
¶ 616	7/14/08	WaMu press release	WaMu sufficiently capitalized and had excess liquidity	**no**	WaMu's press release describing its capitalization and liquidity as of July 14, 2008 was not "corrective" of any prior false or misleading statements in the Registration Statements.

AMENDED COMPLAINT CITE	DATE	DISCLOSURE TYPE	TOPIC	ON ORIGINAL "TIMELINE"?	REASONS NOT "CORRECTIVE"
¶¶ 617-19	7/22/08	WaMu press release & conf. call	Q2 2008 earnings	yes	The Company's second quarter results were not "corrective" of any alleged false or misleading statements in the Registration Statements. Newly announced loan losses, and loss reserves, was "new news." New loan loss reserves were based on "significant changes in key assumptions" used to estimate incurred losses, but such change is not indicative that prior assumptions were false or fraudulent. Increases in losses during 2008 are not "corrective" facts.